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IN THE

Supreme Court of the United States

October Term, 1955

No. 642

STUDENTS BOOK COMPANY, *Petitioner,*

vs.

WASHINGTON LAW BOOK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on December 1, 1955. (R. 221).

OPINION BELOW

The United States District Court for the District of Columbia did not render an opinion in this case. The opinion of the United States Court of Appeals for the District of Columbia is set forth in the Appendix hereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254, as amended. Jurisdiction of the trial court was based on 15 U.S.C. 13, 15.

QUESTIONS PRESENTED

Whether consignment or sale-or-return transactions are exempt from the Robinson-Patman Act; what constitutes a valid consignment entitled to such exemption; whether discrimination as to terms, alone, renders a seller liable; whether a jury should be told that the seller has been adjudicated in violation of the Anti-Trust Laws by another court; whether a trial court should charge a jury as to the District's Sales Tax Act after testimony as to the relationship of sellers and resellers thereunder, and whether a trial court's judgment may be affirmed without opinion, where the only Court of Appeals opinion calls for a new trial.

STATUTES INVOLVED

The pertinent statutes are discussed in the argument. They are set forth in full in the opinion and in the joint appendix below.

STATEMENT

Petitioner, a District corporation, sold books and supplies to students, particularly at nearby George Washington and American Universities, and at Howard University. (R. 60-2). Respondent was the District outlet for its parent, West Publishing Co., (R. 10). Almost 90% of the books used by local law students were handled by Respondent. (R. 48, 91).

To "perfect our service to the bench and Bar," Respondent in 1947 terminated a consignment arrangement with Petitioner and sold books to Respondent at 6% below the retail price, with no right to return unsold books. (R. 86, 120).

In 1949 American's book store began obtaining the books from Respondent at 20% below list price, with the full right to return all unsold books. (R. 63). In 1951 the same privilege was accorded by Respondent to George Washington's store. (R. 17). Petitioner's protests to Respondent were unvailing. (R. 63, 65).

Howard's store bought from Respondent at 6% below list price until 1951 when its discount was increased to 20%. Howard always had the right to return unsold books. (R. 19, 50).

Under the District's Sales Tax Act, Petitioner and all three college stores had filed with Respondent identical reseller's certificates. Each store collected the tax from the students but Respondent neither collected nor remitted any such tax. (R. 13, 66-7, 139-40).

Price lists furnished by Respondent to Howard showed retail price and the cost to the retailer—20% less. (R. 52-3). Respondent's invoices to George Washington and its reports to Respondent showed all items at 20% below list. (R. 37-8).

Respondent's president denied knowledge of the price lists (R. 21-2) and of the "Consignment Sales Reports" filed by George Washington. (R. 159-60). He contended that the transactions with the college stores were all consignments, not sales, (R. 14) and that Respondent was strictly a retailer. (R. 24).

Said president testified he had changed Petitioner's terms because Petitioner was $10,000 delinquent in its account, although Respondent's records showed Petitioner had paid its account in full at that very time. (R. 152-3, 159-62). The fact that Respondent had changed its policy toward Petitioner immediately after Respondent was adjudicated in violation of the Anti-Trust Laws was kept from the jury. (R. 7-8, 38-40).

REASONS FOR GRANTING THE WRIT

1. Confusion Will Result From Silent Affirmance, Vocal Dissent

We have a situation almost unique in appellate proceedings: The only opinion is that of the judge who felt the trial court committed substantial error and that a new trial should be granted. (App. 6a). His colleagues, who comprised the 2-1 majority for affirmance, said nothing.

Thus, on questions of vital importance and of first impression in interpreting acts of Congress, we are left with a well-reasoned opinion, but one which must be studied closely to realize that it does not represent the voice of the court.

Certainly this is not the accepted and usual course of judicial proceedings. The departure is so extreme as to justify this Court in exercising its supervisory power.

2. Basic Questions Require Interpretation by This Court

Since the Robinson-Patman Act amended the Anti-Trust Laws 20 years ago, there has been little interpretation of the prohibition against discrimination in price or terms.

This Court recently stated, in *Moore* vs. *Mead's Fine Bread,* 348 U.S. 115, that Robinson-Patman's prohibition of price discrimination is to be interpreted broadly. This Court previously had struck down the use of consignment subterfuges to circumvent earlier phases of the Anti-Trust Laws. (*Standard Patterns* vs. *Magrane-Houston,* 258 U.S. 346).

If the present decision remains undisturbed, however, Robinson-Patman can be ignored so long as the seller merely rubber-stamps "Consignment" on his invoices, as Respondent did.

There is an equal need for judicial interpretation of Subsection (e) of Robinson-Patman, which prohibits discrimination as to "any service or facilities." In the instant case, it was undisputed that Howard, even while paying the same prices as Petitioner, was permitted to return all unsold books to Respondent for full credit. Petitioner was denied that right, so that, as the opinion points out, Petitioner's gross profits from the sales of 16 books was wiped out by its being stuck with just one such book. (App. 10a).

The Federal Trade Commission, charged with enforcement of Robinson-Patman for the public good, decided in *In re Appleton-Century-Crofts, Inc.,* 1951, 47 FTC 1371, that denial of such privilege of returns violated the act.

Appleton, a publisher of educational texts, accepted for full credit the return of up to one-third of the copies of any book purchased from them, if returned within 60 days of the opening of a semester. But this return privilege was denied to its customers who also dealt in secondhand books.

The Commission ordered Appleton to cease and desist from "furnishing of the service or facility of accepting the return for credit of unsold copies of such books, to any purchaser of such books, when such service or facility is not accorded on proportionally equal terms to other purchasers of such books, . . ." No judicial review of this decision has been found.

3. Conflict Between Sales Tax Act and Robinson-Patman Should be Resolved

In 1949 Congress enacted a Sales Tax Act for the District of Columbia. Under its provisions, Respondent obtained from each college store and from Petitioner a re-seller's exemption certificate.

On this basis, Respondent (which described itself as merely a retailer, not a distributor) collected and remitted no sales tax on books sent to the college stores or to Petitioner.

As the opinion makes clear, the significance of the Sales Tax Act should have been explained to the jury, to help them solve the puzzling question of consignment vs. sales. But the trial court refused to charge the jury thereon. (App. 5a, 9a).

If Congress, in passing the Sales Tax Act 13 years after Robinson-Patman, did not intend the designations of the one to apply to the other, Congress did not say so and it is, therefore, for this Court to clarify.

4. Respondent's Anti-Trust Violations Improperly Kept From Jury

The trial court's attention was directed to the fact that Respondent and its parent, West Publishing, had been found in violation of the Anti-Trust Laws in

Callaghan vs. *FTC, II,* 163 F. 2d 359. The trial court refused to permit the jury to hear of this. (R. 7-8).

Even if this decision did not violate 15 U.S.C. 16, the question was raised anew when Respondent's president testified as to his reasons for changing its sales policy toward Petitioner. When Petitioner sought to cross-examine him as to the connection between this change of policy and the anti-trust decision of *two weeks earlier,* objection thereto was sustained. (R. 38).

Respondent went into the matter further by showing a change of policy toward one of its *Callaghan* co-respondents. When Petitioner sought to cross-examine into that phase of the anti-trust violation, the trial court again sustained objection, adding a threat of mistrial. (R. 40-1).

It was Respondent, not Petitioner, which had gone back into this 1947 change of sales policy. Thus the trial court immunized Respondent against any questioning of its policy flowing from the anti-trust violation. This was directly contrary to the spirit, if not the letter, of 15 U.S.C. 16.

The Court of Appeals did not deal with this issue.

CONCLUSION

It is respectfully submitted that because of the importance of the questions and the manner in which they have been left unresolved, this petition for a writ of certiorari should be granted.

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January 25, 1956